STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

RALPH ORMSBY and KIMBERLY ORMSBY,

Plaintiff-Appellee,

v.

CAPITAL WELDING, INC., an Ohio Corporation, and MONARCH BUILDING SERVICES, INC., an Ohio Corporation,

Defendants-Appellant.

Supreme Court Nos. 123287; 123289
Court of Appeals No. 233563
Oakland Circuit No. 98-008608-NO

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STATEMENT OF THE QUESTION INVOLVED

Are the "retained control doctrine" and the "common work area doctrine" separate and what is the scope of each doctrine?

- The Court of Appeals held that the doctrines are separate, but did not adequately define the scope of the "retained control doctrine."
- The parties did not specifically address these questions in their applications for leave to appeal.
- MMA contends that the *only* basis for imposing direct tort liability on a *general contractor* is "the common work area doctrine" and that an owner's "retained control" over the general contractor is a separate requirement necessary to impose "common work area" liability on an *owner*.

STATEMENT OF FACTS

MMA adopts the factual statements set forth in the applications for leave to appeal.

ARGUMENT

I. Introduction and Summary

This brief addresses the scope of an owner's[1] "retained control" liability to the employee of an "independent" contractor—one of the issues addressed in the Court of Appeals published opinion. This is a confused area of law sorely in need of Supreme Court guidance. Contrary to the vague and unrestricted holding of the published Court of Appeals, MMA contends that an owner's so-called "retained control" liability is specifically limited to situations where the owner actively assumes the role of a general contractor, and thereby assumes the unique duties of a general contractor. General contractor duties arise *only* where (1) a general contractor has supervisory and coordinating authority over the job site, (2) a common work area is shared by the employees of several subcontractors, (3) there is a readily observable, avoidable danger in that common work area, (4) and the danger creates a high risk to a significant number of workers. See *Hughes v PMG Building, Inc.*, 227 Mich 1, 6; 574 NW2d 691 (1997). If an owner actively retains control over a general contractor, as in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1971), then the owner may be held liable according to the above rule. Other than this rule—assuming that *Funk* itself is not overruled—there is no valid basis for any sort of separate "retained control" *liability*.

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[1] Throughout this brief, MMA will refer to the first entity hiring an independent contractor as the "owner." (While such a person or business association will often, though not always, own the land upon which the work is to be performed, this brief's use of the word "owner" is not meant to imply any particular type of ownership.) The Court should be careful to distinguish "owners" from "general contractors." While general contractors hire independent contractors (*i.e.*, subcontractors), they are also typically independent contractors themselves, hired by an owner.

Accordingly, MMA would answer the question posed in the Court's grant order as follows: Only the "common work area" doctrine imposes a direct tort duty to injured workers. The limited duty imposed by the "common work area" doctrine is owed *only* by general contractors, or persons *acting as* general contractors. In this context, the "retained control doctrine"—which merely elevates substance over form—is the vehicle by which an owner may be held liable *as a general contractor* under the "common work area doctrine." Thus, while the "retained control doctrine" has a function separate than the "common work area doctrine," it is not a separate and independent basis for tort liability.

Generally speaking, when an owner hires an independent contractor, the owner is free from liability arising from the work relationship, because the owner contracts only for a finished result and does not direct the manner in which the result is accomplished. See, e.g., *Candelaria v BC General Contractors*, 236 Mich App 67, 72-73; 600 NW2d 348 (1999); *Prosser & Keaton on Torts* (5th ed), § 71, p 509. The Court of Appeals addressed the retained control "exception" to this rule. As this brief sets forth in detail below, during the century before *Funk*, the concept of retained control was used only to define the existence of a master-servant relationship (as opposed to an owner-independent contractor relationship). If the owner retained control over the manner in which the work was to be performed, then the parties effectively stood in a master-servant relationship. If not, then the worker was deemed an independent contractor. The question of the worker's legal status was relevant both to the existence of direct liability from master to servant (whether at common law or pursuant to worker's compensation laws) and to the existence of vicarious liability through the doctrine of respondeat superior. See, *infra*, §§ IV-A, IV-B. Eventually, the "economic reality" test replaced the "control" test, as the method used

to determine the existence of an employment relationship for purposes of worker's compensation. See, *infra*, § IV-C.

In *Funk*, *supra*, this Court held that an owner's retention of control over a project rendered it potentially liable, in tort, to the injured employee of a subcontractor. In the same case, the Court determined that the general contractor employed by the owner to supervise and coordinate the subcontractors was subject to a new form of tort liability based on the unique responsibilities of a general contractor. See, *infra*, § IV-D. MMA contends that, under the most reasonable reading of *Funk*, the owner's retention of control subjected it to liability to the injured worker only because the owner, through its active exercise of control over the entire project, assumed the unique role and responsibilities owed by *the general contractor*. As such, the owner's retained control liability can be no broader than that of the general contractor. Where there is no general contractor, and the owner simply becomes a *de facto* master, worker's compensation provides the only available relief, if any.

To the extent an owner's retention of control might be said to establish a *de facto* master-servant relationship, this alone should not support an independent duty in tort. The master-servant relationship is governed exclusively by the laws of worker's compensation, and no common law master-to-servant tort duties exist outside of worker's compensation. Because the worker's compensation laws provide ample protection, there is no need for a new tort duty over and above the protection offered by worker's compensation. Accordingly, if an owner, as a *de facto* master, is not liable to the injured worker under the laws of worker's compensation—perhaps because some other entity is considered to be the "employer" responsible for worker's compensation—then no liability at all arises from the master-servant relationship. Only by actively assuming the special responsibilities of a general contractor (by retaining control over a

general contractor) is there any arguably-valid basis for imposing a tort duty over and above the worker's compensation remedy. This is so because the general contractor duty, as defined in *Funk*, exists *independently* from the master-servant relationship, *i.e.*, a general contractor's liability does not arise from the fact that it *employs* subcontractors, but rather, from the fact that it assumes the responsibility for coordinating and supervising the work of several subcontractors within a common work area.

II. The current state of the law regarding "retained control" over independent contractors is vague and lacks a coherent foundation.

As noted in the applications for leave to appeal, the law governing the liability of the employers of independent contractors is "confused." Although the *Ormsby* panel sought to eradicate confusion—as did the *Candelaria* Court before it—confusion nevertheless persists.

As an example of the confusion, the *Candelaria* Court explained that "[t]he doctrine of retained control applies only in those situations involving 'common work areas.'" *Candelaria, supra* at 74. In so doing, it assumed that the owner's "retained control" liability to subcontractors' employees was directly related to the general contractor's duty to ensure that adequate safety precautions are taken in "common work areas." *Id.* at 74-75. In an attempt to clarify the *Candelaria* decision, the *Ormsby* Court held—*contrary* to the rule stated in *Candelaria*—that an owner's retained control liability to subcontractors' employees does *not* require a "common work area," because the "common work area" rule is separate from and unrelated to the doctrine of "retained control." See *Ormsby, supra* at slip op pp 6-10.

A second source of "confusion" is the vague and undefined nature of retained control liability described by the *Ormsby* Court. Where *Candelaria* placed substantial limits on the scope of retained control liability, *Ormsby* announced a vague, open-ended rule:

> [W]here an employer retains less control than that of a master, but *enough* supervisory control, the law *may* impose a duty to exercise this control with

> reasonable care to prevent the work from causing injury. [*Ormsby, supra* at slip op p 5 (emphasis added).]

This formulation begs the obvious question: "enough" for what? More importantly, the *Ormsby* Court's vague and open-ended definition of "retained control" liability is without natural limits. Once it is determined that an owner has retained "enough" control, and therefore has a duty, what is the *scope* of the owner's duty? How much control should be "exercised," and under what circumstances?

One is also prompted to ask how an "independent contractor" can remain "independent" while under the employer's "control." Generally speaking, an "independent contractor" is defined in terms of control—or, more accurately, the *absence* of control. See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992) (explaining that an independent contractor is defined as "one who carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished."); *Black's Law Dictionary* (7th ed.), p 774 (defining an independent contractor as "[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to chose the method for accomplishing it.)" 1 Restatement of Agency, 2d, § 2 (defining an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking"). In contrast, an "employee" is defined, in a general sense, as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of the work performance." *Black's Law Dictionary* (7th ed.), p 543. If the *absence* of control by the owner is the hallmark of independent contractor status, then the concept of "retained control" over an independent contractor is dubious from the outset.

Finally, as noted in *Candelaria*, *supra* at 74, n 1, there has been some confusion in the Court of Appeals regarding the distinction between direct and vicarious liability based on "retained control."

This case presents an opportunity for this Court to provide some much needed clarity to this important area of the law.

III. The scope of retained control liability is a subject of interest to employers because of the likely impact on "premises" based asbestos suits.

The scope of retained control liability is of interest to the MMA in part because of the effect it may have on a new wave of "premises" based asbestos lawsuits. "Asbestos liability" is a major concern of manufacturers, as a number have already been forced into reorganization or out of business due to asbestos suits. The concern is not limited to the manufacturers of asbestos or to manufacturers who have used components containing asbestos. Because of the cap on the amount of damages recoverable in products liability suits, a significant number of asbestos plaintiffs are forsaking products liability theories in favor of suits based on their alleged exposure to asbestos while working on the premises of manufacturers as employees of independent contractors. In addition to bringing "traditional" premises liability claims, which are subject to the traditional limitations of premises liability law, asbestos plaintiffs are also bringing claims based on the employment relationship existing between the owner (often a manufacturer) and independent contractors. Therefore, the scope of retained control liability will have a significant impact on asbestos liability.

IV. The Historical Development of Retained Control Liability in Michigan

To best understand how the "retained control" theory of liability has evolved to its present state, one must understand its origins within Michigan jurisprudence.

A. *Retained control developed as a device to determine the existence of a master-servant relationship for purposes of vicarious and direct liability at common law.*

In the early cases, the concept of "retained control" served two related functions. First, it was used—as it still is today—to determine the scope of the master-servant relationship for purposes of imposing respondeat superior liability on the master for the negligent acts of the servant. See, e.g., *Ripley v Priest*, 169 Mich 383; 135 NW 258 (1912); *Bissell v Ford*, 176 Mich 64; 141 NW 860 (1913); *Marchand v Russell*, 257 Mich 96; 241 NW 209 (1932); *Brinker v Koenig Coal & Supply Co*, 312 Mich 534; 20 NW2d 301 (1945); *Candelaria, supra* at 73 (citing more recent cases). Whether an owner can be held liable for the negligent acts of its workers depends on whether the worker is an employee (*i.e.,* a servant) or an independent contractor. *Id.* This, in turn, depends on the owner's retention of "control." *Id.* Where the owner exercises, or retains the right to exercise, control over the manner or method of the work, a master-servant relationship exists, and the master may be held vicariously liable for the servant's torts under agency principles. *Id.*

Second, in appropriate circumstances, an owner's retention of control over the manner or method of the work could render the owner *directly* liable to an injured worker. In *Samuelson v The Cleveland Mining Co*, 49 Mich 164; 13 NW 499 (1882), which predated the enactment of worker's compensation legislation, this Court suggested that direct liability to an injured worker could arise solely from the owner's retention of control over the performance of its contractor's work.[2] *Samuelson* involved a worker killed in a mining accident. The defendant, which owned an iron mine, hired a mining company to deliver ore from the mine according to the terms and

[2] In a factually similar case from four years earlier, *Lake Superior Iron Co v Erickson*, 39 Mich 492, 502-503 (1878), this Court found liability based on a mine owner's status as the possessor of land containing a "dangerous property," effectively combining notions of traditional premises liability with the inherently dangerous activity doctrine.

conditions of a written contract. The plaintiff, a miner, was killed by a falling rock while working the mine. The contract between the owner and the mining company provided, somewhat ambiguously, that the mining company was responsible for the safety of the workers, but that "making the mine safe should be under the supervision, advice and direction of [the owner's] superintendent." *Id.* at 175.

The plaintiff alleged that the owner "owed a duty to all persons employed in the mine to be vigilant in guarding against dangers and that this duty was wholly neglected." *Id.* at 168. The Court explained that where an owner "retains charge and control" of the work, "his moral accountability for [the workers'] safety is as broad *as it would be if he were working the mine in person*," *i.e.*, working the mine as a master. *Id.* at 174 (emphasis added). The Court further explained that a contractual provision purporting to put the mine in the contractor's control would be "futile" if the "substance" of the parties' relationship showed the owner to, in fact, be in control: "If a man is principal in a transaction, he cannot relieve himself of the obligations of a principal by stipulating that he shall only be known and considered as an agent or servant." *Id.* That being said, this Court concluded that the owner was *not* liable to the plaintiff based on the existence of the contract alone: Simply contracting for the "privilege" of a right to supervise "does not make the owner *principal* in the mine, or *master* in the working of it." *Id.* at 175. Thus, under *Samuelson's* reasoning, an owner is subject to liability *only* if retains control sufficient to render it a "master."[3] In sum, under *Samuelson*, an owner's liability to a worker depended on the existence—in substance, if not in form—of a master-servant relationship.

[3] At common law, before worker's compensation laws were enacted, a master could be held liable to its servant, in tort, for failing to exercise reasonable care for the safety of its servant. See, e.g., *Prosser & Keaton on Torts* (5th ed), § 80, p 569.

Consistent with the respondeat superior cases, the existence of a master-servant relationship was determined by the "control" retained by the owner.

B. *After the enactment of worker's compensation legislation, the "retained control" test continued to be the device by which the Court determined the existence of a master-servant relationship.*

In 1912, the legislature enacted a worker's compensation scheme in Michigan that replaced the common law tort duties masters owed to servants. Other than this change in the nature and source of a master's liability to its servant, the "retained control" test continued to operate in precisely the same manner as it had before the enactment of worker's compensation. For purposes of cases alleging respondeat superior liability outside of the realm of worker's compensation, the defendant's retention of control over the worker determined the existence or nonexistence of vicarious liability. See respondeat superior cases cited, *supra*, in § IV-A.

The "retained control" test also continued to delineate the scope of the master-servant relationship for purposes of determining the "master's" direct liability to the servant. See, e.g., *Tuttle v Embury-Martin Lumber Co.*, 192 Mich 385, 399-400; 158 NW 875 (1916) (holding that an owner was liable to pay worker's compensation because a master-servant relationship arose out of the owner's retention of control); *Ryder v Johnson*, 313 Mich 702, 709; 22 NW2d 43 (1946) (affirming an award of worker's compensation where the evidence showed that the owner, "under the arrangement between himself and plaintiff, retained such right of control and direction as to establish the relationship between the parties as that of employer and employee.").

Under this scheme, the question whether the owner "retained control" over the work determined whether, on one hand, a master-servant relationship existed between the parties (subjecting the owner to worker's compensation liability) or, on the other hand, whether the owner was *entirely free* from liability (there being no master-servant relationship).

For example, in *Arnett v Hayes Wheel Co*, 201 Mich 67, 69; 166 NW 957 (1918), a question arose as to which one of two alleged "masters" was liable to the injured worker for worker's compensation. The *Arnett* case involved a manufacturing company (owner) that contracted with another company (contractor) to install a certain machinery in its facility. Despite the fact that the injured worker had been hired and paid by the contractor, the Supreme Court held that the owner was liable for worker's compensation, and the contractor was "not liable," because the owner retained control over the work at its facility, making the worker a "temporary servant" of the owner. *Id.* at 70-71.

In other words, liability to the injured worker was dependent on the existence of a master-servant relationship. There is no indication in the Michigan case law from this period that the retained control test was relevant to anything other than the establishment of a master-servant relationship or that retained control provided the basis for a direct duty, in tort, outside of worker's compensation.

C. *For purposes of worker's compensation liability only (not respondeat superior liability) the "economic reality" test replaced the "retained control" test.*

In 1959, this Court announced a new test for the determination whether a master-servant relationship existed for purposes of worker's compensation. In *Tata v Muskovitz*, 354 Mich 695, 699; 94 NW2d 71 (1959), this Court adopted the "economic reality" test, which previously had been espoused by Justice Talbot dissenting opinion in *Powell v Employment Security Comm'n*, 345 Mich 455; 75 NW2d 874 (1956). Rather than focusing *exclusively* on the question of control, the economic reality test considers a number of factors—including the owner's retention of control—to determine whether the relationship is covered by worker's compensation laws. See *Powell, supra* at 478-479 (Smith, J., dissenting); *McKissic v Bodine*, 42 Mich App 203, 207-209; 201 NW2d 333 (1972) (setting forth the factors bearing on the "economic reality" test).

Although the *method* used to determine the existence of the master-servant relationship for worker's compensation purposes changed somewhat with the adoption of the economic reality test, the *existence* of a master-servant relationship remained essential to establishing the master's direct liability to an injured worker as an incident of the employment relationship. Thus, in *Goodchild v Erickson*, 375 Mich 289, 292-294; 134 NW2d 191 (1965), when this Court was again faced with a dispute as to which one of two alleged "masters" should be held liable to an injured worker—just as it had faced in *Arnett, supra*—this Court applied the economic reality test to determine whether the contractor (who had hired and paid the injured employee) or the owner (who allegedly controlled the work) should be the party held liable to the injured worker.[4]

In sum, after *Tata, supra*, but before *Funk, supra*, "retained control" in the employment context was relevant only to the question whether an owner could be held *vicariously* liable for the torts of those in its employ (as defined by the retention of control). During this period, no case appears to have stood for the proposition that an owner, by retaining a certain degree of control over work performed by an independent contractor, could be *directly* liable, in tort, to an injured worker. In the master-servant context, direct liability was—as it should be today—governed exclusively by worker's compensation laws.

D. *In Funk v General Motors, this Court established a new rule of general contractor liability and revived interest in "retained control" as a potential basis for direct tort liability—outside of the worker's compensation context.*

The seminal Michigan case on the doctrine of "retained control," as a basis for establishing the direct liability of employers of independent contractors, is *Funk v General Motors*. The case involved an owner (GM), an architect, a general contractor, a subcontractor,

[4] It should be noted that the economic reality test has since been replace by a statutory definition of who constitutes "employee" for worker's compensation purposes. See MCL 418.161; *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999).

and an injured worker (Funk). Funk, an employee of the subcontractor, was injured when he fell while working on a new construction project at GM. After receiving worker's compensation from the subcontractor, Funk brought a third-party liability suit against both GM and the general contractor alleging that they owed him a duty to ensure that the workers on the project used adequate safety equipment to protect against falls. *Funk, supra* at 99-101. This Court affirmed a verdict against the general contractor on the ground that, in certain circumstances, a general contractor is responsible for the safety of its subcontractors' employees. *Id.* at 104. The *Funk* Court also held that GM could be held liable because, through the supervision over the project by its architect, it "retained and exercised sufficient control so that it ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor." *Id.* at 108.

1. The "Common Work Area" Rule of General Contractor Liability.

With respect to the plaintiff's claim against the general contractor, *Funk* established a new duty, applicable only to general contractors. While recognizing that the subcontractor was "immediately responsible for job safety," see *id.* at 102, Justice Levin, writing for the majority, reasoned as a matter of public policy that:

> [p]lacing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas. [*Id.* at 104.]

On this basis, Justice Levin concluded that "part of the business of a general contractor" was to "assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." The rule of general contractor liability first

announced in *Funk* has since evolved into a four-part test: For a general contractor to be liable, there must be (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, (3) a readily observable, avoidable danger in that work area, (4) that creates a high risk to a significant number of workers. See, e.g., *Hughes, supra* at 6. While not overtly stated, it is also clear that the other elements of negligence, *i.e.,* breach, causation, and damages, also must be shown.

2. The Owner's "Retained Control" Liability.

After concluding that the general contractor could be held liable, Justice Levin also reasoned that the owner could be held liable, because it "assumed a dominant role" in the construction job and, therefore, could "properly be held responsible for the failure to implement adequate safety measures." *Id.* at 108. As support for the conclusion that GM exercised a dominant role in the project, the *Funk* Court noted that GM drew up the plans, wrote the contract specifications, hired several of the general contractor's subcontractors, wrote the subcontractor's contracts (which were later assigned to the general contractor), had an architect present at the work site every day, conducted "on-the-spot" inspections of the work, and acting through its architect supervised certain aspects of accident prevention. *Id.* at 105-107. On the basis of this "exercise by General Motors of a retained control of the project," Justice Levin concluded that GM could properly be held liable, in the same manner as the general contractor, "for the failure to observe safety precautions and provide safeguards."

Justice Levin cited only one Michigan authority for the proposition that an owner may be held liable based on "retained control." In *Bissell v Ford, supra*, a case decided by this Court in 1913, this Court held that an owner could be held *vicariously* liable to a third party for the negligence of a hired worker based on the owner's retention of the right to control how the work should be done. *Id.* at 73-76 (holding that a property owner excavating on his own site could be

held liable to an adjacent property owner for a collapse of the adjacent land caused by negligence in the excavation where the owner's architect retained authority to direct the workers on how the excavation should be performed). Apart from *Bissell*, the *Funk* Court also relied on *Quinones v Upper Moreland Twp*, 293 F2d 237 (3rd Cir, 1961), which applied Pennsylvania law, but without a great deal of explanation of its legal rationale.

V. The rule of *Funk* should not be extended beyond situations involving general contractor liability—which exists only where there is a "common work area."

MMA contends that *Funk* should be limited to its facts. Where the owner's retention of control over the work of the *general contractor* effectively renders the owner a *de facto* general contractor, then the owner should be held liable for the specific duties *of a general contractor*, which are separate from, and exist outside the realm of, the master-servant relationship. Rather than being based on the existence of any sort of *de facto* master-servant relationship existing between the general contractor and the employees of its subcontractors, the special duties of a general contractor are based on the general contractor's unique role as the party responsible for coordinating the work of several subcontractors. This liability exists outside the realm of the master-servant relationship.

To the extent that an owner's retention of control does nothing more than render the owner a *de facto* "master" in a master-servant relationship with the injured worker, then the owner's liability, if any, should be governed exclusively the rules of worker's compensation, which have governed master-servant liability for the past 92 years. Today, there is no logical place for the existence of a common law tort duty arising from the master-servant relationship. Therefore, MMA agrees with the matter-of-fact conclusion of the *Candelaria* Court that "[t]he doctrine of retained control applies only in those situations involving 'common work areas.'" See *Candelaria*, *supra* at 74.

A. *On its face, the Funk case arguably may be understood in three different ways, only one of which is wholly consistent with the body of Michigan law.*

Because its rationale is not entirely clear, the *Funk* case arguably may be understood in three different ways.

First, the Court may have reasoned that GM's retained control over the project rendered GM a *de facto* master over the injured servant. While this reasoning would have been consistent with the notion that the retention of control can establish a master-servant relationship, it would have permitted Funk to collect from two different "masters" (the subcontractor and the owner) on two separate theories (worker's compensation and tort). Because worker's compensation is the sole remedy for injuries arising in the master-servant context, it would be improper to allow an injured servant to recover from two "masters" on two different theories. See, *infra*, § V-B.

Second, the Court may have reasoned that GM was liable in tort to the extent that it retained control over the project but that, for whatever reason, its retention of control did *not* render GM a *de facto* master. This reasoning would have been inconsistent with prior Michigan law holding that the retention of control creates a master-servant relationship (as opposed to some other type of employment relationship). It would also have required the Court to conclude that an owner can retained control over the work of an *independent* contractor, which, by definition, is impossible.

Third, the Court may have reasoned that GM's retained control over the project rendered GM a *de facto* general contractor (rather than simply a *de facto* master). This would have been consistent with the common-sense notion, first expressed in *Samuelson*, *supra*, that the legal nature of an employment relationship should be judged by its substance rather than its form. If GM had, through its actions, effectively assumed the role of general contractor (as the *Funk* Court's factual recitation suggests), then it would make sense to hold GM liable to Funk *in the*

same manner as a general contractor. Because general contractor liability to workers is founded on a relationship other than the master-servant relationship, this third reading of *Funk* avoids the anomaly of one "master" being liable for worker's compensation while a second "master" is held liable in tort for what is, essentially, the same relationship, *i.e.,* master and servant.

B. *The master-servant relationship does not provide a proper basis for legal liability (between master and servant) apart from worker's compensation.*

To the extent that an owner's retention of control over a worker places the owner "in the shoes of" a master (*i.e.*, establishes a master-servant relationship), as has been its traditional function, then the owner's liability to the injured worker should be governed by worker's compensation laws, which define the liability owing from master to servant. Apart from worker's compensation, the only historical basis for finding liability owing from master to a servant was the traditional common law tort duties owed by masters to servants. See, e.g., *Prosser & Keaton on Torts* (5th ed), § 80, p 569 (describing the master's traditional common law duties to the servant as the duty to provide a safe place to work, the duty to provide safe tools, the duty to give reasonable warning of dangers unknown to the employee, the duty to provide a sufficient number of fellow servants, and the duty to promulgate and enforce rules of conduct on the job). These common law rules, having been displaced by worker's compensation, have fallen out of use. Just as the "fellow-servant rule" and the "volunteer doctrine" were made obsolete with the invention of worker's compensation, so too were the master's traditional common law tort duties owed to the servant. Cf. *James v Alberts*, 464 Mich 12, 17-18; 626 NW2d 158 (2001) (confirming the extinction of the "volunteer doctrine"). Therefore, unless *Funk* is understood to have created some *new* theory of tort recovery based on the master-servant relationship, the owner's status as a *de facto* master—obtained by virtue of its retained control—would not provide a proper basis for the imposition of direct tort liability to an injured worker.

Additionally, the retained-control discussion in *Funk* should not be understood to have established a *new* theory of tort recovery arising from the master-servant relationship. With worker's compensation rules already in place to protect injured workers, there was—and is—no reason to create a *new* theory of tort recovery arising from the master-servant relationship. In addition to being unnecessary, the creation of a *new* tort duty arising between master and servant would upset the legal context within which the worker's compensation laws were enacted. Accordingly, if an owner is to be held liable *outside* the realm of worker's compensation, it must be on some basis *other than* the master-servant relationship.

C. *In Funk, the owner retained control over the general contractor and, thereby, effectively assumed the unique liabilities of a general contractor—which are different in kind than the liabilities of a "master."*

As noted above, the "retained control" test traditionally served no purpose other than to define the master-servant relationship. By retaining control over the master, the owner "stepped into the shoes" of the master. The logic of this rule would also apply to the retention of control over a general contractor. In other words, by retaining control over the general contractor, an owner would necessarily "step into the shoes" of the general contractor. Substance over form. Before *Funk* there was no reason to distinguish general contractors from other types of independent contractors, because the "common work area" rule did not exist. However, by creating a new tort duty applicable to only general contractors, *Funk* created a reason to distinguish *general* contractors from other independent contractors.

When GM actively retained control over the general contractor, it assumed the duties of a general contractor. Because these duties exist apart from the traditional master-servant relationship and, therefore, outside of the realm of worker's compensation, GM properly could be held liable in tort, as a third-party tortfeasor. In other words, viewing GM as a *de facto*

general contractor rather than simply as a *de facto* "master" avoids the problem of having to identify a tort duty based on the master-servant relationship outside the scope of worker's compensation. Moreover, in addition to being consistent with the rest of Michigan law, viewing GM as a *de facto* general contractor is the simplest way to read the facts of *Funk*, where the only party with whom GM had a contract was, in fact, the general contractor. Thus, any retention of control by GM necessarily amounted to a retention of control over the general contractor. Because the general contractor was liable for failing to implement sufficient safety precautions, GM could be found similarly liable.

The import of this conclusion is that owner liability under the doctrine of retained control must be limited to situations where the owner assumes the role of general contractor and, thereby, assumes the unique responsibilities of a general contractor. The conclusion that an owner assumes some general duty in tort simply by acting as a *de facto* "master" in a master-servant relationship lacks an historical basis in Michigan law. If the owner's retention of control does nothing more than establish a *de facto* master-servant relationship, then there is no basis for liability outside of worker's compensation. Only where the owner actively assumes the role of general contractor, or retains control over an independent contractor that is also a general contractor, does the special rule for general contractors provide an arguably rational basis for tort relief outside of worker's compensation.

D. *This Court's subsequent retained control opinions are consistent with MMA's reading of the Funk rule.*

Since the *Funk* decision, this Court has had only two occasions to address the *Funk* rule, and neither case produced an opinion garnering four votes. Notably, however, this Court's subsequent decisions are consistent with MMA's position that the "retained control" liability

described in *Funk, supra*, is necessarily limited to the specific duties owed by a general contractor.

In *Plummer v Bechtel Construction Co*, 440 Mich 646; 489 NW2d 66 (1991), a worker was injured when he fell from an elevated platform. Relying on *Funk, supra*, he sued both the general contractor (Bechtel) and the owner (Edison) for failing to take reasonable precautions to protect his safety. In the lead opinion, Justice Levin (also the author of *Funk*) explained that Edison "exercised an unusually high degree of control over the construction project" including the authority to hire and terminate subcontractors. *Id.* at 559-661. Importantly, Justice Levin then went on to conclude as to *both* Bechtel and Edison—without distinguishing the liability of the owner from the liability of the general contractor—that the work site constituted a "common work area." *Id.* at 666. Apart from addressing the question whether Edison retained control over the project (an issue not relevant to the *actual* general contractor), the lead opinion treated Bechtel's and Edison's liability as being coextensive and dependent on the same factors, including the existence of a common work area. In her separate opinion, Justice Boyle agreed that there was a "common work area" without giving any indication that this would only be relevant to Bechtel. *Id.* at 670 n 1.

The other case to address the *Funk* rule was *Groncki v The Detroit Edison Company*, 453 Mich 644; 557 NW2d 289 (1996). In *Groncki*, the only defendant alleged to be liable under *Funk* was a general contractor, and no retained control claim was brought against the owner that hired the general contractor.

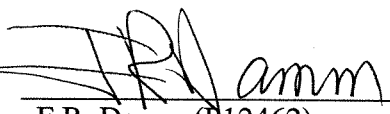
CONCLUSION

Unless an owner's retention of control over a contractor results in the owner undertaking the role of a general contractor—and thereby assuming the unique duties of a general contractor–retained control does not provide a basis for tort liability outside of worker's compensation. This

is so because, except for those situations where the retention of control involves general contractor responsibilities, the retention of control over a contractor does nothing more than establish a *de facto* master-servant relationship. Liability for master-servant relationships is governed by worker's compensation. Therefore, unless the four elements of general contractor/common work area liability are present in addition to the owner's retention of control, an owner is not subject to retained control liability. Because the *Ormsby* panel held otherwise in a published decision, MMA urges this Court to REVERSE the Court of Appeals decision in *Ormsby*. MMA further urges this Court to clarify that the sole function of the "doctrine of retained control" is to impose *general contractor* liability, under the common work area rule, when an owner, through the exercise of actual control, effectively steps into the shoes of a general contractor, as GM did in the *Funk* case.

Respectfully submitted,

CLARK HILL PLC

By: 

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Date: January 5, 2004